OCT 1 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940

No. 478

METROPOLITAN BUILDING & LOAN ASSOCIATION ET AL,
Petitioners,

vs.

TEXAS UNEMPLOYMENT COMPENSATION COMMISSION ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Metropolitan Building and Loan Association, Houston Building and Loan Association, Mutual Deposit and Loan Company, San Antonio Building and Loan Association, Dallas Building and Loan Association, Gibraltar Savings and Building

Association, Abilene Building and Loan Association, First Federal Savings and Loan Association of Beaumont, First Federal Savings and Loan Association of San Antonio and First Federal Savings and Loan Association of Pampa, for a Writ of Certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, respectfully shows to this Honorable Court:

I.

QUESTION PRESENTED

Whether an Act of the Congress of the United States, which subjects Petitioners to designation by the Secretary of the Treasury as fiscal agents of the Government of the United States and under which three of Petitioners have been designated as fiscal agents and are acting as such, and which Act of Congress further empowers Petitioners to serve as agents for any other federal instrumentality when designated for that purpose by such other instrumentality, makes Petitioners instrumentalities of the United States, exempt from the provisions of a state taxing statute which specifically excepts such instrumentalities.

II.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

This Court has jurisdiction to review by certiorari the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas under Section 237 of the Judicial Code as amended (U. S. C. A., Title 28, Section 344) which provides that:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination,

with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

III.

STATUTES INVOLVED

The statute of the United States, under which Petitioners specially set up and claim rights, privileges and immunities as instrumentalities of the Government of the United States, is the Act of May 27, 1935, Chapter 150, Section 18, 49 Stat. 297 (Section 1464, Title 12, U. S. C. A.). This statute provides for the organization and conduct of "Federal Savings and Loan Associations" and subjects such associations and any member of a Federal Home Loan Bank to designation as fiscal agents of the United States or of any instrumentality of the general government. The provisions of the statute here involved read as follows:

"(f) Each such association (Federal Savings and Loan Association), upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the District in which it is located, * * *.

* * *

> "(k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and loan association or member of any Federal Home Loan Bank may be employed as **fiscal agent of the Government** under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as **fiscal agent of the Government** as may be required of it. Any Federal savings and loan association or member of any Federal Home Loan Bank may act **as agent for any other instrumentality of the United States** when designated for that purpose by such instrumentality of the United States." *

The Texas statute involved herein is Chapter 482, Acts of the Third Called Session, Forty-fourth Legislature, as amended by Chapter 67, Acts of the Regular Session, Forty-fifth Legislature (Article 5221b, Vernon's Texas Civil Statutes), which statute is commonly known, and herein referred to, as the Texas Unemployment Compensation Act. Generally, this statute sets up a system of unemployment compensation for the State of Texas and levies contributions upon each employer subject to the Act for the establishment of a fund for the payment of unemployment benefits to those eligible to receive such benefits under the provisions of the statute. Section 7(a)(1) of the Act, as amended (Article 5221b-5(a), Vernon's Texas Civil Statutes), provides that:

> "On and after January 1, 1936, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act, with respect

*All emphases are ours unless otherwise indicated.

to wages payable for employment occurring during such calendar year. Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulation as the Commission may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in such employer's employ."

(Here follows the rate of contributions levied by the Act.)

Section 19(g)(6) of the Act, Chapter 67, page 130, Acts of the Regular Session, Forty-fifth Legislature, provides that:

"The term 'employment' shall not include:
* * *

"(b) Service performed in the employ of any other State or its political subdivisions, or of the United States Government, or of an instrumentality of any other State, or States or their political subdivisions or of the United States."

IV.

DATE OF JUDGMENT AND DATE OF PRESENTATION OF PETITION FOR CERTIORARI

The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas sought to be reviewed herein was entered on April 3, 1940 (R., 46). Petitioners' Motion for Rehearing was filed in the said Court of Civil Appeals within fifteen days as authorized by Article 1877, Revised Civil Statutes of Texas, 1925 (R., 46). This motion was entertained by the Court of Civil Appeals and overruled on April 24, 1940 (R., 50). Thereupon, within the time allowed by applicable state statute (Article 1742, Revised

Civil Statutes, Texas, 1925), Petitioners petitioned the Supreme Court of Texas to grant a writ of error and review the judgment of the Court of Civil Appeals (R., 51). The Petition for Writ of Error was refused by the Supreme Court of Texas on June 12, 1940 (R., 55). The Petitioners thereupon within fifteen days, as is authorized by Rule 4 of the rules of the Supreme Court of Texas, filed their Motion for Rehearing of the Application for Writ of Error (R., 55). This motion was entertained by the Supreme Court of Texas and was overruled on July 3, 1940 (R., 59), whereupon the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, here sought to be reviewed, became final under state law.

The said Court of Civil Appeals has possession of the record in this cause and is the "highest court of the state in which a decision in the suit could be had."

The date on which this Petition for Certiorari is presented is October 1, 1940.

V.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This suit was instituted by Petitioners in the District Court for the 126th Judicial District of Texas, Travis County, Texas, as an action for injunction to restrain Respondents from enforcing or attempting to enforce against Petitioners the contributions and other provisions of the Texas Unemployment Compensation Act (R., 1-9). The case was submitted upon an agreed statement of facts (R., 10-21), and upon such facts the trial Court rendered judgment for Petitioners and against Respondents granting the

injunction as prayed for (R., 21-24). The trial Court filed Findings of Fact and Conclusions of law (R., 24-35).

Petitioners alleged in their Original Petition and the trial Court found in accordance with the stipulated facts that seven of the Petitioner corporations (Metropolitan Building & Loan Association, Abilene Building and Loan Association, Houston Building & Loan Association, Mutual Deposit & Loan Company, San Antonio Building & Loan Association, Dallas Building & Loan Association and Gibraltar Savings & Building Association) were organized as building and loan associations under the laws of the State of Texas and were, at the time of the trial of this cause, transacting building and loan businesses thereunder (R., 3, 12, 25); that each of the said seven Petitioner corporations prior to January 1, 1937, had become and is now a member of the Federal Home Loan Bank of Little Rock, Arkansas, and has subscribed and paid for stock in said Federal Home Loan Bank under the provisions of Article 881a-37, Vernon's Texas Civil Statutes, and Title 12, Sections 1444, 1422(4), Chapter 11, United States Code Annotated (R., 3, 12, 26-27); that the remaining three Petitioner corporations (First Federal Savings & Loan Association of Beaumont, First Federal Savings & Loan Association of San Antonio and First Federal Savings & Loan Association of Pampa) were organized under the provisions of Title 12, Chapters 11 and 12, U. S. C. A., and are now transacting business thereunder and that these corporations also have subscribed and paid for stock in the Federal Home Loan Bank of Little Rock and are members of said Federal Home Loan Bank (R., 4-5, 14-15, 28-29).

The trial Court further found, in accordance with the stipulated facts, that the United States Government, through the Home Owners Loan Corporation, holds a large amount of stock in each of the Petitioner corporations (R., 18-19, 32-33).

It was stipulated by the parties and found by the trial Court (R., 13, 27, 15, 29) that each of the Petitioner corporations is subject to the provisions of Subsection "K" of Section 1464, Title 12, U. S. C. A., which is set out verbatim under Heading III hereof. It was further found by the trial Court and agreed by the parties that by virtue of the said Act of Congress, all of the Petitioner corporations are subject to designation by the Secretary of the Treasury as fiscal agents of the United States and are authorized to act as agents for any instrumentality when designated for that purpose by such other instrumentality (R., 13, 27, 15, 29), and that the three federal associations already have been designated as fiscal agents of the United States, by the order of Wayne C. Taylor, acting Secretary of the Treasury of the United States (R., 15, 29).

It was Petitioners' contention, and was the conclusion of the trial Court, that since Petitioners are each subject to the requirement of acting as "fiscal agent" of the United States upon designation by the Secretary of the Treasury, they are each an "instrumentality of the United States"; and that since the Texas Unemployment Compensation Act expressly provides that it should not apply to any "instrumentality of the United States," Petitioners are expressly exempt from said statute (R., 4, 5, 35).

Further to support Petitioners' contention that they are each an instrumentality of the United States and are therefore not liable for the contributions levied by the Texas Unemployment Compensation Act, it was also shown in the trial Court that the Collector of Internal Revenue of the United States, the officer charged with the assessing and collecting of all taxes provided for in the Federal Social Security Act, has held, under an administrative ruling, that the Petitioners herein are instrumentalities of the Federal Government and are not subject to the Federal Social Security Act because of its exemption of such instrumentalities (R., 20, 34).

The trial Court, having made findings of fact as outlined above, and having concluded as a matter of law that the Petitioners and each of them are instrumentalities of the Government of the United States and, therefore, not liable for the contributions levied by the Texas Unemployment Compensation Act, and that Petitioners were entitled to the injunctive relief as prayed for, judgment was entered by the trial Court accordingly (R., 21)

Respondents appealed the cause to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, which Court sustained Respondents' Assignments of Error (R., 35) in an opinion holding that Petitioners were not instrumentalities of the United States Government and were therefore not exempt from the provisions of the Texas Unemployment Compensation Act (R., 37). Said Court of Civil Appeals entered its judgment reversing and rendering the cause against Petitioners and in favor of Respondents and dissolving the injunction of the District Court (R., 46).

The only written opinion delivered in the State Courts is that of the Court of Civil Appeals (R., 37-45), which is unofficially reported in 139 S. W. (2d) 309.

VI.

NATURE OF THE RULINGS OF THE STATE COURT BRINGING THE CAUSE WITHIN THE JURISDICTION OF THIS COURT

(Under this heading also will be shown when and how the federal question sought to be reviewed was raised; the method of raising it; and the way in which it was passed upon by the State Court.)

The federal question sought to be reviewed herein was presented by Petitioners in their Original Petition upon which the cause was tried in the District Court. As is more specifically shown under Heading V, Petitioners alleged in their petition that each of them owned stock in and was a member of the Federal Home Land Bank and that under the provisions of Subsection K of Section 1464, Title 12, U. S. C. A., each of Petitioners was subject to designation by the Secretary of the Treasury of the United States as fiscal agent of the Government of the United States, or of any other instrumentality of the United States, and upon such designation would be required to perform all reasonable duties required of it as such fiscal agent. It was further alleged that the three Petitioners organized as federal associations had actually been designated as fiscal agents of the United States and as such were performing the duties which had been required of them. Petitioners alleged that they were not subject to the provisions of the Texas Unemployment Compensation Act and that its enforcement against them

should be enjoined because such Act specifically exempted from its provisions all instrumentalities of the United States Government (R., 1-9).

It was agreed by the parties to this cause that the foregoing allegations were true and correct (R., 10-21), and such facts were adopted as the trial Court's Findings of Fact (R., 24-34). Upon these findings the trial Court concluded that each of Petitioners was an instrumentality of the Government of the United States under the Act of Congress hereinbefore set out and therefore exempt from all contributions, payments, taxes, interest or penalties imposed by the Texas Unemployment Compensation Act (R., 35), and that Court granted the injunction as prayed for by Petitioners enjoining the enforcement of the Texas Unemployment Compensation Act against these Petitioners or any of them (R., 21-24).

From the judgment of the District Court Respondents prosecuted their appeal to the Court of Civil Appeals for the Third Supreme Judicial District and assigned as error the holding of the trial Court to the effect that Petitioners were instrumentalities of the Government of the United States and as such exempt from the provisions of the Texas Unemployment Compensation Act (R., 36).

The Court of Civil Appeals in a written opinion sustained Respondents' assignments of error and reversed and rendered the judgment of the trial Court and dissolved its injunction (R., 37-45). As appears from the opinion of the Court of Civil Appeals, it was specifically recognized by the Court that each of the Petitioners is subject to the provisions of Subsection K

of Section 1464, Title 12, U. S. C. A., and that under said Act each of Petitioners is subject to designation by the Secretary of the Treasury as fiscal agent of the United States and that three of Petitioners had been so designated and were acting as such; nevertheless, the Court held that none of Petitioners was an instrumentality of the United States (R., 40-45).

Concerning the seven State associations, the Court of Civil Appeals held that "building and loan associations created under State law do not become 'federal instrumentalities' exempt from contributions or taxes imposed on employers by State unemployment compensation laws, merely because such state-created building and loan associations have complied with pertinent state and federal laws and have become members of the Federal Home Loan Bank, or because of their consequent relationship thereto under pertinent State and Federal statutes" (R., 43). In holding that the three Petitioners, organized under Federal statute, were not federal instrumentalities, even though they had been designated as fiscal agents and were performing duties as such, the Court of Civil Appeals held that Chapters 11 and 12 of Title 12, U. S. C. A., "merely provide that such associations shall, upon organization, 'automatically' become members of the Federal Home Loan Bank; and that such membership merely makes them **fiscal agents of the Federal Government** if and when called upon by federal authorities to act" (R., 44).

In conclusion, the Court of Civil Appeals held that the State associations and Federal associations were not "federal instrumentalities" for the same basic reasons, saying:

> "That is, both the state and federal associations are organized, owned and operated for profit of their shareholders. As members of the Federal Home Loan Bank each enjoys the same identical privileges conferred and **each must perform the duties imposed by the Federal Government.** Neither is owned by the Federal Government, and although **each does promote governmental policy,** that fact does not convert either of these private institutions into an 'instrumentality of government' of the United States within the meaning of that term as used in the Texas Unemployment Compensation Act" (R., 45).

These rulings of the Court of Civil Appeals were duly assigned as error in Petitioners' Motion for Rehearing (R., 46-50) which motion was overruled (R., 50). The rulings were then complained of in the Petition for Writ of Error filed in the Supreme Court of Texas (R., 51-55). The Petition being refused (R., 55), the same rulings were complained of in Petitioners' Motion for Rehearing filed in the Supreme Court of Texas (R., 55), which motion was by that Court overruled (R., 59).

VII.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTION INVOLVED IS SUBSTANTIAL AND CASES BELIEVED TO SUSTAIN JURISDICTION

The only question presented herein is the construction and application of an Act of the United States Congress. More specifically, the sole issue involved is whether Petitioners are made instrumentalities of the United States by a Federal statute which subjects all of Petitioners to designation by the Secretary of the

Treasury as fiscal agents of the Federal Government and under which statute three of Petitioners have been designated as fiscal agents and are performing the duties required of them as such, and which statute further empowers Petitioners to act as agents of any other federal instrumentality when designated for that purpose by such other instrumentality.

It was stipulated by the parties (R., 13), found by the trial Court (R., 27) and recognized by the Court of Civil Appeals (R., 41) that each of Petitioners was subject to designation as fiscal agent of the Federal Government under the provisions of Subsection K of Section 1464, Title 12, U. S. C. A. Likewise, the parties agreed (R., 15), the trial Court found (R., 29) and the Court of Civil Appeals recognized (R., 41) that the three Petitioners, organized under Federal statute had been designated by the Secretary of the Treasury as fiscal agents of the Government and are performing, on behalf of the Federal Government, the duties required of them as fiscal agents. In its opinion (R., 40), the Court of Civil Appeals acknowledged that the Texas Unemployment Compensation Act exempts Petitioners, if they are made federal instrumentalities by the aforementioned Act of Congress.

From the foregoing it is seen that the decision of the Federal question is not only necessarily involved in this cause, but also that the determination of the Federal question is decisive of the entire case. The Court of Civil Appeals held that the Act of Congress here involved makes Petitioners "fiscal agents of the Federal Government if and when called upon by federal authorities to act" (R., 44), and further that "each (Petitioners) must perform the duties imposed by the Federal Government" and that "each does pro-

mote governmental policy." (R., 45); but the Court concluded that these facts did not make Petitioners instrumentalities of government entitling them to the exemptions admittedly granted such instrumentalities by the State Act (R., 45).

Not only does the State Court's construction of the federal statute present a federal question decisive of the case, but it is submitted that the statute has been erroneously construed under long established precedents of this Court.

We call the Court's attention to the wording of the statute that Petitioners shall perform all reasonable duties of "fiscal agents" of the Government when called upon by the Secretary of the Treasury. This, we believe, is conclusive of the question as to whether each of Petitioners is an "instrumentality" of the Federal Government. However, further evidencing the intention of the Congress to make Petitioners "federal instrumentalities," the Act provides that each of Petitioners shall act as fiscal agent of the United States, or as "agent for any **other** instrumentality of the United States" when designated for that purpose. (U. S. C. A., Sec. 1464(k), Title 12) By the use of the words **"other instrumentality"** the statute reveals that the Congress intended to make members of a Home Loan Bank and Federal Savings and Loan Associations instrumentalities of the United States Government.

From the above statute, it is plain that the Congress made these Petitioners fiscal agents of the Government of the United States, nor does the Court of Civil Appeals question this fact; but that Court concluded that Petitioners did not thereby become instrumentalities of the United States (R., 44-45). That

fiscal or financial agents of the Federal Government are instrumentalities of that Government, we believe, has not been open to doubt since the decision in *McCulloch vs Maryland*, 4 Wheaton 315, 422, wherein the Court stated:

> "If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy."

This decision has been reaffirmed in *Osborn vs United States Bank*, 9 Wheaton 738; *Davis vs Elmira Savings Bank*, 161 U. S. 275; *Owensboro National Bank vs Owensboro*, 173 U. S. 664; *Farmers' & Mechanics' National Bank vs Dearing*, 91 U. S. 29.

In the last case above cited at page 33, the Court held:

> "The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge."

The Court of Civil Appeals held that Petitioners are not instrumentalities of the Federal Government for one basic reason; "that is, both the state and fed-

eral associations are organized, owned, and operated for profit of their shareholders" (R., 45). This holding is incompatible with the decisions of this Court in *Osborn vs Bank*, 9 Wheaton 738 and *Smith vs Kansas City Title & Trust Co.*, 255 U. S. 180.

In *Osborn vs Bank*, 9 Wheaton 738, 860, the Supreme Court held:

> * * * "It (a bank) is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the Government are effected, it is also trading with individuals for its own advantage."

Again in *Smith vs Kansas City Title & Trust Company, supra*, 255 U. S. 180, 208, this Court held:

> "Since the decision of the great cases of McCulloch vs Maryland, 4 Wheat. 316, and Osborn vs Bank, 9 Wheat. 738, it is no longer an open question that Congress may establish banks for national purposes, only a small part of the capital of which is held by the Government, and a majority of the ownership in which is represented by shares of capital stock privately owned and held; the principal business of such banks being private banking conducted with the usual methods of such business."

The Court of Civil Appeals seems to emphasize the fact that none of the state created associations has been actually designated as fiscal agent of the United States Government and further that although the three federal associations have been designated as such agents, they have performed duties as such of

only a limited nature (R., 41). That these facts are immaterial in determining the question here presented is foreclosed in *Smith vs Kansas City Title & Trust Company*, 255 U. S. 180, 210, wherein the Court held:

> "It is said that the power to designate these banks as such depositaries has not been exercised by the Government, and that the federal land banks have acted as federal agents only in the case of loans of money for seed purposes made in the summer of 1918, to which we have already referred. **But the existence of the power under the Constitution is not determined by the extent of the exercise of the authority conferred under it.** Congress declared it necessary to create these fiscal agents, and to make them authorized depositaries of public money. Its power to do so is no longer open to question.
>
> "But, it is urged, the attempt to create these federal agencies, and to make these banks fiscal agents, and public depositaries of the Government, is but a pretext. But nothing is better settled by the decisions of this Court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives * * *."

To demonstrate that the holding of the State Court herein probably is not tenable, we call the Court's attention to *First Federal Savings & Loan Association vs Loomis*, (7th Circuit), 97 Fed. (2d) 831, wherein the statute here involved was construed by the Court. The suit was brought by the First Federal Savings & Loan Association of Wisconsin to enjoin interference with the plaintiff's business by certain named officials of

the State of Wisconsin. The Court expressly upheld the constitutional validity of "the Home Owners Loan Act of 1933 as amended, 12 U. S. C. A., Sec. 1464."

Following *Smith vs Kansas City Title & Trust Company*, 255 U. S. 180, the Court held, page 836, that the "existence of the power under the Constitution is not determined by the extent of the exercise of the authority conferred under it." The Court concluded, page 838, that the *Smith case, supra*, required the holding that federal savings and loan associations were fiscal agents of the United States Government and that the necessity therefor and the intention or motives of Congress in designating such associations as fiscal agents are matters "entirely within the legislative province."

Pointing out that the *Smith case* had held Federal Land Banks to be fiscal agents of the United States, which banks were subject to designation to perform fiscal duties slightly different from those which may be required of Federal Savings & Loan Associations, the Court stated, page 839:

> "The mere fact, however, that Congress has not seen fit to confer precisely the same fiscal duties upon each of these agencies, to our mind, is unimportant. The fiscal duties of the federal government are many and varied and the court in the Smith case, having upheld the authority of Congress to designate land banks as fiscal agents for the purpose of performing certain governmental functions, it necessarily follows in our opinion, that the power is in Congress to provide for and designate savings and loan associations as such agents, with duties not greatly dissimilar."

We submit that the judgment of the Court of Civil Appeals that Petitioners have not been made instrumentalities of the United States by the Congress is contrary to the above cited cases and that the State Court's erroneous decision of this federal question has resulted in denying to Petitioners rights, privileges and immunities under the statutes of the United States which rights, privileges and immunities were specifically set up and claimed by these Petitioners and each of them.

VIII.

REASONS FOR GRANTING THE WRIT

A.

A federal question of substance not theretofore determined by this Court was decided by the Court of Civil Appeals for the Third Supreme Judicial District of Texas in favor of Respondents, by holding that an Act of the Congress of the United States (Act of May 27, 1935, Chapter 150, Section 18, 49 Stat. 297; Section 1464, Title 12, U. S. C. A.), which subjects Petitioners to designation by the Secretary of the Treasury as fiscal agents of the Government of the United States and under which statute three of Petitioners have been designated as fiscal agents and are acting as such, and which statute authorizes Petitioners to serve as agents of other federal instrumentalities when designated for that purpose by such other instrumentalities, does not make Petitioners instrumentalities of the United States, entitling them to the specific exemptions of such instrumentalities carried in the Texas Unemployment Compensation Act.

B.

The Court of Civil Appeals for the Third Supreme Judicial District has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, in this: The said Court of Civil Appeals held that the aforementioned Act of Congress makes Petitioners "fiscal agents of the Federal Government if and when called upon by federal authorities to act" (R., 44); that Petitioners under said statute "must perform the duties imposed by the Federal Government" (R., 45) and that Petitioners "promote governmental policy" (R., 45); but, notwithstanding these facts, the State Court held that none of Petitioners was an instrumentality of the United States, because Petitioners are "owned and operated for profit of their shareholders" and none of Petitioners "is owned by the Federal Government" (R., 41, 45). This decision of the Court of Civil Appeals is probably not in accord with the decisions of this Court in *McCulloch vs Maryland*, 4 Wheaton 315; *Osborn vs Bank*, 9 Wheaton 738; *Davis vs Elmira Savings Bank*, 161 U. S. 275; *Farmers' & Mechanics' National Bank vs Dearing*, 91 U. S. 29; *Owensboro National Bank vs Owensboro*, 173 U. S. 664; and *Smith vs Kansas City Title & Trust Co.*, 255 U. S. 180, wherein this Court has held that those upon whom Congress has imposed the duty and power to serve as fiscal or financial agents of the United States Government are instrumentalities of that government, regardless of the extent to which such power is exercised and although the principal business of such agents is private, and conducted in the usual method of such private businesses.

C.

The Court of Civil Appeals has held that Petitioners were not made federal instrumentalities by the federal statute here involved. This holding upon a substantial federal question is probably in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *First Federal Savings and Loan Association vs Loomis*, 97 Fed. (2d) 831, wherein the Court sustained the validity of the federal statute here involved and, following *Smith vs Kansas City Title & Trust Company*, 255 U. S. 180, affirmed the judgment of the United States District Court enjoining threatened interference by the State officials of Wisconsin with the business of the plaintiff loan association upon the ground that Congress, acting within its constitutional powers, had made the plaintiff a fiscal agent of the general government and as such the Plaintiff was authorized to do business in the State of Wisconsin free from interference by the officials of that State.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, commanding that Court to certify and send to this Court, on a day certain to be therein named, for its review and determination a full and complete transcript of the record and proceedings had in said Court and entitled on its docket No. 8838, *Texas Unemployment Compensation Commission et al, Appellants, vs Metropolitan Building and Loan Association et al, Appellees*, to the end that this cause may be reviewed and determined by this Court as provided

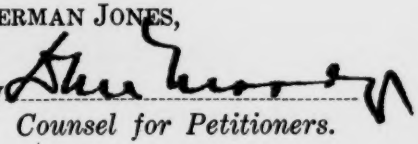
by the Statutes of the United States and that the judgment of the said Court of Civil Appeals be reversed by this Court, and for such other and further relief as to this Honorable Court may seem right and proper.

Dated this 1st day of October, 1940.

A. E. WOOD,

DAN MOODY,

HERMAN JONES,

By 

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Petitioners

v.

TEXAS UNEMPLOYMENT COMPENSATION COMMISSION, ET AL,
Respondents

RESPONDENTS' MOTION TO REFUSE THE PETITION FOR WRIT OF ERROR

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.----------

METROPOLITAN BUILDING & LOAN ASSOCIATION, ET AL,
Petitioners

v.

TEXAS UNEMPLOYMENT COMPENSATION COMMISSION, ET AL,
Respondents

RESPONDENTS' MOTION TO REFUSE THE PETITION FOR WRIT OF ERROR

To the Honorable The Supreme Court of the United States

Respondents object to the court granting the writ of certiorari in this cause and pray that said petition be denied for the following reasons:

I.

The question determined by the Court of Civil Appeals in Texas adverse to the contention of the petitioners is not in conflict with any of the decisions

of this court and does not involve a Federal question.

II.

The holding of the Court of Civil Appeals in Texas in the case at bar is in line with the holdings of the courts of the various states in the Union as well as in harmony with the holdings of this court on the question involved, namely, that petitioners are not such instrumentalities of the Federal Government as exempt them from the provisions of the Unemployment Compensation Law of Texas.

STATEMENT, AUTHORITIES AND ARGUMENT

The Legislature of Texas in 1937 amended what is known as the Unemployment Compensation Act, being House Bill No. 586, chapter 67, page 121, Regular Session.

Petitioners' sole contention is that they are exempt from the provisions of said statute because they, and each of them, are instrumentalities of the Federal Government.

The only reason they claim to be instrumentalities of the Federal Government is that they, and each of them, own stock in the Federal Home Loan Bank created under the provisions of 12 U. S. C. A. page 962. Their contention is that by subscribing to the stock they became a member of the Federal

Home Loan Bank, and that since the Secretary of the United States Treasury may require them, and each of them, to perform some duties for the Federal Government, it makes them instrumentalities of the Government, although they have never rendered any such service.

In other words, petitioners rely entirely upon their right to be relieved from the Unemployment Compensation Law by virtue of the fact that they have become members of the Federal Home Loan Bank and therefore may in the future be required to perform some service for the United States Government. They do not claim that they have ever performed or rendered any service for the United States Government.

Section 19(g) (6) of the Unemployment Compensation Act of Texas (being the statute in controversy) reads:

> "The term 'employment' shall not include; * * *.
>
> "(B) Service performed in the employ of any other state, or its political subdivision, or of the United States Government, or of an instrumentality of any other state or states or their political subdivisions or of the United States."

The above quoted provision of the Texas statute is almost an exact copy of the Federal Social Security Act, 42 U. S. C. A., par. 1107 (c) (5) which

provides that the term "employment" means any service, "except * * * service performed in the employ of the United States Government or of an instrumntality of the United States."

The Court of Civil Appeals in the case at bar, 139 S. W. (2d) 309, held that petitioners were not such instrumentalities of the Federal Government as exempted them from the provisions of the Texas statute. This we submit is in conformity with the decision of all the courts which have passed on the unemployment compensation statutes.

In *Capital Building and Loan Association v. Kansas, Commission of Labor*, 83 Pac. (2d) 106, the Supreme Court of Kansas upheld a law almost identical with the statute of Texas and held that the building and loan associations were not exempt from payment of unemployment compensation.

In *Buckstaff Bathhouse Co.* v. *McKinley, Commissioner*, 60 U. S. Sup. Ct. 279, this court affirmed a judgment of the Supreme Court of Arkansas, 127 S. W. (2d) 802, which upheld in all respects a statute very similar to the Texas statute here involved.

In *Fidelity-Philadelphia Trust Co.* v. *Hines*, 10 Atl. (2d) 553, the Supreme Court of Pennsylvania upheld a statute very similar to the one here involved.

In *North Carolina Unemployment Compensation Commission* v. *Wachovia Bank & Trust Co.*, 2 S. E.

(2d) 592, the Supreme Court of North Carolina upheld a law almost identical with the one here involved.

In *Western Bank & Trust Co.* v. *Unemployment Compensation Commission of Ohio* (Court of Appeals not yet published), the court upheld a statute almost identical with the Texas statute here involved.

Chapter 11, Title 12, of the United States Code, known as the Federal Home Loan Bank Act, provides for the creation of Federal Home Loan Banks and the manner whereby Building and Loan Associations, Savings and Loan Associations, Cooperative Banks, Homestead Associations, Insurance Companies and Savings Banks shall be eligible to become members or so-called Non-Member Borrowers of such Federal Home Loan Banks.

No where in Chapter 11 is there any provision whereby the Member Banks are designated as agents or instrumentalities of the Federal Government. Provision is made, however, for the creation of Federal Home Loan Banks and their designation as agents of the Federal Government; the manner in which such banks can be taxed by the State is definitely set out. Chapter 12 of Title 12 entitled "Home Owners Loan Act of 1933" provides for the creation of the Home Owners Loan Corporation and in Section 1464 provides for the creation of Federal Savings and Loan Associations; provides that such Federal Savings and Loan Associations shall, upon

their organization, immediately become members of the Federal Home Loan Bank. There is also provided that any Member Bank of the Federal Home Loan Bank shall upon a majority vote by its eligible voters become a Federal Savings and Loan Association subject to all the provisions of the Act.

Section 1464, Subsection (k) of said Act, reads as follows:

> "When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Associations, or Member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as such fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or Member of any Federal Home Loan Bank may act as agents for another instrumentality of the United States."

The mere fact that incorporation may be required to render some service under certain conditions to the United States Government does not by reason thereof create them instrumentalities of the Government such as will exempt them from taxation. This principle is well illustrated in the following cases:

> Western Union Telegraph Company v. Texas, 105 U. S. 460.
>
> C. O. G. Railroad Company v. Mackey, 256 U. S. 531.

Thomson v. Union Pacific Ry., 9 Wall 579.
South Carolina v. United States, 199 U. S. 437.

Section 1464, Subdivision (h) of the Home Loan Act of 1933, reads:

> "Such Associations including their franchise, reserves, surplus, loans and incomes shall be exempt from all taxation now or hereinafter imposed by the United States, and all shares of such Associations shall be exempt both as to their value and the incomes therefrom from all taxation (except surtax, estates, inheritance and gift taxes) now or hereafter imposed by the United States, and no state, territory, county, municipal or local taxing authority shall impose any tax on such associations or their franchise, capital, reserve, surplus, loans, or income, greater than that imposed by such authorities on other similar local, mutual or cooperative thrift and home financing institutions."

There is no contention in this case by petitioners that there is any greater or heavier tax or burden imposed by the Act in question on them than is imposed on all other business concerns operating or doing business within the State of Texas.

The Unemployment Compensation Act as passed by Texas is almost identical with that passed by practically every state in the Union and is patterned after the Social Security Tax Act of Congress and is an attempt on the part of Texas to cooperate with the Federal Government and with all other states

in creating a uniform Unemployment Compensation Law.

Respondents pray that the petition for writ of certiorari in this cause be in all things refused and denied.

Respondents have furnished counsel for petitioners copies of this reply and motion.

Respectfully submitted

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